4 Regulatory barriers for occupations

4.5 Insolvency practitioners

The Insolvency Practitioners Association (IPA sub. 7) are concerned that the different regulatory treatment of the administration of personal insolvency (commonly termed bankruptcy) and corporate insolvency of companies (commonly termed liquidation or winding up) is impeding the efficient conduct of the insolvency regime and imposing an unnecessary regulatory burden on insolvency practitioners. The IPA highlights in particular:

> … the costs of dealing with separate regulators — … ITSA [Insolvency and Trustee Service Australia] and ASIC — and keeping up-to-date with changing compliance and reporting requirements of both; and the costs of practitioners setting up compliance systems, collecting information, preparing and checking reports, form-filling, document storage, for both. (IPA sub. 7, p. 5)

IPA recommend that steps be taken to harmonise the relevant laws and regulations, where possible. Some of the areas identified by the IPA as being particularly suitable for harmonisation, included:

- the claiming and fixing of remuneration and any court review of that process
- the process for convening and holding meetings of creditors
- proofs of debt
- provisions for payment of a dividend
- time limits.

The IPA identified various other provisions in the corporate and personal insolvency law that have the same legal effect, but use a different approach or wording.

Assessment

Australian insolvency laws are based on the s 51(xvii) power under the Constitution — 'bankruptcy and insolvency'. The Commonwealth *Bankruptcy Act 1966* deals with personal insolvency and chapter five of the Commonwealth *Corporations Act 2001* deals with corporate insolvency.[10] The *Cross-border Insolvency Act 2007* applies to both personal and corporate insolvencies. There are also a range of insolvency provisions for specific entities in various State and Commonwealth laws — for example, for partnerships,[11] cooperatives, associations, banks and insurance companies.

The IPA point out the separation of corporate and personal insolvency law is more the result of historical evolution, than policy or legal reasons. It considers that the 'reference in the Constitution to "insolvency" as being confined to corporate insolvency is antiquated' (sub. 7, p. 2). and, in principle, it has always been possible to have a single Commonwealth insolvency statute.

The Attorney General's Department is responsible for the administration of bankruptcy policy and its practice by the profession is regulated by ITSA. Corporate

[10] Regulations, court rulings and ITSA and ASIC Guides support these Acts. Also relevant are the IPA Code of Professional Practice for Insolvency Practitioners and the Accounting Professional and Ethical Standards Board's professional standard covering Insolvency Services. These professional standards apply to both personal and corporate insolvency practitioners.

[11] Although some partnerships can also be wound up under the Bankruptcy Act or Corporations Act.

insolvency policy is administered by Treasury and the practice of corporate insolvency is largely regulated by ASIC.

> An insolvency practitioner may be a person registered by ITSA as a trustee in bankruptcy, and at the same time be registered by ASIC as a registered liquidator. A trustee is then regulated by ITSA and is subject to regulation and discipline processes under the Bankruptcy Act. Corporate insolvency practitioners — liquidators, administrators, receivers — are registered and regulated by ASIC and are disciplined by processes under the Corporations Act. (IPA sub. 7, p. 2)

The issue of the merits of harmonising or merging corporate and personal insolvency law has been considered by various reviews over the last two decades, including:

- 1988 Australian Law Reform Commission *General Insolvency Inquiry* (Harmer Report)
- 1992 (the former) Trade Practices Commission *Study of the Professions: Legal*
- 1997 *Review of the Regulation of Corporate Insolvency Practitioners*
- 2004 Report of the Parliamentary Joint Committee (PJC) on *Corporations and Financial Services Corporate Insolvency Laws: A Stocktake*.

These reviews recognised that there were some advantages in having more uniform regulation, but none went as far as recommending full harmonisation or a single regulatory framework. The most recent, the 2004 PJC Report, recommended that the Government 'ensure, particularly when contemplating changes to the law, that the two streams of Australia's insolvency laws, personal bankruptcy and corporate insolvency, harmonise where possible' (Recommendation 59, p. 228)

This was consistent with the earlier Harmer Report (although overall the report considered the lack of uniformity to be 'not a major issue'):

> … as far as possible and necessary, the Commission [Australian Law Reform Commission] has sought in the Report to promote the uniformity of the substance of the provisions relating to individual and corporate insolvency. Moreover, to the extent that future reforms proposed for the law relating to either individual or corporate insolvency touch matters which are common to both (particularly where those reforms affect procedural matters), it is the Commission's view that corresponding reforms should be made to both sets of laws. (ALRC 1988, p. 14).

The Government's response to the 2004 PJC Report supported the recommendation 'in principle', but noted:

> There are different policy considerations in corporate insolvency and personal bankruptcy, which may give rise to necessary variations in the legal frameworks.

> There are arrangements in place for securing cost savings and streamlining the administration of corporate and personal insolvency law. … ITSA and ASIC have entered into a Memorandum of Understanding. … and will continue to consult in the development of insolvency/bankruptcy policy. (Australian Government 2004, p. 24)

Various arguments in favour of greater harmonisation of corporate and personal insolvency laws have been advanced in previous reports and submissions to reviews, as well as the IPA's submission to this review. These include:

- practitioners operating in both areas would benefit from time and cost savings as a result of having to understand and deal with only one set of common provisions, and procedures
- there would be less complexity and scope for error
- government cost savings in a unified scheme, including the potential for consolidating regulatory responsibilities and a single system for the registration of practitioners within a single department or agency
- there is often a significant interaction or overlap (and/or common issues to consider) between personal and corporate insolvency, particularly when dealing with small or micro businesses
- the current system can also pose difficulties for members of the public, especially creditors (most frequently institutional creditors) that need to be aware of the differing rules between corporate and personal insolvency depending on the sort of administration of which they are creditors
- many aspects and fundamental concepts of insolvency are common to both the corporate and personal areas and insolvency law can be viewed as a distinct field of law, rather than a part of company or commercial law.

The Commission also notes that a unified approach to personal and corporate insolvency is a feature of some overseas regulatory frameworks, including in the United Kingdom, Canada and the United States.

That said, arguments have also been made in favour of maintaining some separation of corporate and personal insolvency law, including:

- different policy considerations between corporate and personal insolvency — reflecting fundamental differences between natural and corporate persons — necessitate some differences in approach
- personal insolvency laws must balance the needs of consumer bankruptcies with the needs of business bankruptcies, whereas for corporate insolvency there is a need to balance the different needs of small and large enterprises

- corporate insolvency law is arguably an integral feature of corporate law and a unified personal and corporate insolvency law could result in fragmentation of corporate law
- practical difficulties and costs associated with making the necessary changes — for example, the process for determining which provisions could appropriately be harmonised and the subsequent drafting of unified legislation are both likely to be complex and resource intensive exercises
- transition costs for business and regulators associated with moving to any new regime.

Some submissions to the PJC review also argued that the current separate structure for personal insolvency posed no significant difficulties in practice and therefore there was no pressing need for reform. Furthermore, many practitioners operate in only one area, particularly those who practise only in corporate insolvency. This could explain what the IPA perceive as the low priority the Government has given to acting on the recommendations of previous reviews. The IPA suggest, however, that the lack of reform is more likely the result of there being no area of government with responsibility for both areas of insolvency.

In principle, there are likely to be efficiencies in having a single regulator take responsibility for both areas of insolvency law. These would include pooling of regulatory resources, greater consistency in decision making and the benefits for business of dealing with one regulator. However, there could also be various complexities, costs or risks associated with a merger. Some of these would be dependant on the merger option chosen. If the single regulator was not a specialist insolvency regulator (for example if ITSA was merged into ASIC) there is a risk of a loss of focus or transfer of resources to other regulatory activities. On the other hand, the creation of a specialist regulator (for example by merging ASIC insolvency functions and responsibilities into ITSA) may not produce the same cost savings or administrative efficiencies. It should also be noted that ITSA currently has a range of non-insolvency functions, such as administering Child Support and Proceeds of Crime Orders and it is also intended that ITSA will acquire additional administrative responsibilities in relation to personal property security regulation.

In conclusion, while certain fundamental differences between personal and corporate insolvency may mean that a full merger or complete harmonisation of rules and processes is not appropriate, there is clearly scope for greater harmonisation or alignment of provisions, including the use of common legislative wording and approaches. This could occur whilst maintaining separate legislation or a single law could be considered. Importantly, a single law would not necessarily require the merger of all elements of the laws.

While the Commission acknowledges the existing commitment by ITSA and ASIC to work toward streamlining the administration of corporate and personal insolvency law, the concerns raised by IPA suggest that more needs to be done. The Commission endorses the suggestion of the IPA that a reform task-force be set up to identify possible areas for harmonisation of existing personal and corporate insolvency provisions.

Where there is a clearer case for harmonised provisions (perhaps in relation to such procedural matters as hiring and firing practitioners, setting and reviewing remuneration, record keeping and reporting, holding of meetings and determining voting entitlements) changes should be implemented as soon as practicable, rather than waiting for agreement to be reached in relation to more complex or controversial matters.

In a similar vein, and as recognised by previous reviews, it is also particularly important that, at any time when changes to either legal framework are contemplated, the scope for greater harmonisation or alignment of provisions and processes is always considered. The current broad ranging Senate Economics Committee Inquiry into Liquidators and Administrators, presents one such opportunity. Although focused on the area of corporate insolvency, the Inquiry has touched on a number of inconsistencies between personal and corporate insolvency regulation and the issue of a single insolvency system has been raised. For example, some participants in the inquiry identified aspects of ITSA's regulation of bankruptcy trustees that could be a good model for ASIC to adopt in its regulation of corporate insolvency practitioners. The Inquiry is due to report at the end of August 2010.

In parallel with the deliberations of the reform taskforce that the Commission has proposed, the Government should examine the case for making a single regulator responsible for both areas of insolvency law, including the registration of insolvency practitioners.

DRAFT RECOMMENDATION 4.4

A taskforce should be established to identify personal and corporate insolvency provisions and processes that could be aligned. The taskforce should comprise officials from the Attorney-General's Department and the Treasury and should also work closely with the Insolvency and Trustee Service Australia and the Australian Securities and Investments Commission. The case for making one regulator responsible for both areas of insolvency law should also be examined.